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"PEACE OF MIND" IN 48 PIECES VS. UNIFORM RIGHT OF PRIVACY*

FREDERICK J. LUDWIG**

By 1890, when Warren and Brandeis¹ urged judicial recognition of a right of privacy, certain changes in living conditions had already created need for a new tort. Close living and mass urbanization came as a result of the industrial revolution and tide of immigration. Mass produced goods needed mass markets and a merchandising technique of high-pressure advertising was born. As literacy and compulsory education became widespread, a new journalism emerged. Gossip columnists and human interest stories swelled circulation to astronomical figures.² New technology brought the linotype, high speed printing press and instantaneous photograph. What chance of survival was there for a life of dignity and seclusion? What freedom from prying curiosity? What hope for peace of mind? The common law with remedies formulated in a pre-industrial age furnished no protection. Libel and slander were only superficially appropriate because of the defense of truth. The ancient but discarded maxim, "The greater the truth, the greater the libel," once the rule in criminal actions,³ demonstrated that making public private affairs of another causes no less emotional disturbance because of the veracity of the disclosure.

In the last half-century, confusion has followed in the wake of statutes and decisions on privacy in a few states, and enigmatic silence about the right in the rest. Twentieth century technology has brought the radio, television, newsreels and motion pictures. National syndication of columns and international transmission of news and photographs has broadened the reach of journalism. Advertising has overflowed state barriers. Today, the typical invasion

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1. "The Right to Privacy," 4 Harv. L. Rev. 193 (1890).

2. Cf. *id.* at 196: "The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle."

3. *De Libellis Famosis*, 5 Coke 125 (1605).

of privacy involves most of the 48 states. The purpose of this survey is to examine the problem in the light of legislative and judicial experience with the new tort and to consider a solution in the form of a proposed uniform statute.

I

Consideration of the origins of the right of privacy, the inadequacies of existing case law, the consequences of disguised recognition of the right, the conflict-of-laws problems it presents, and the shortcomings of existing statutes points to the desirability of uniform legislation. It also indicates the scope and limitations of a workable statute on the subject.

A. ORIGIN OF THE RIGHT

Early American judicial history of the right of privacy has demonstrated the necessity of legislative action. In 1881, a Michigan court in *De May v. Roberts*⁴ allowed recovery against a physician who unnecessarily permitted an unmarried, non-professional man to accompany him at a childbirth without the patient knowing his true status. Although the invasion was in the nature of an intrusion upon private activities, the mental distress was similar to that produced by an unwarranted publication. This was the first American case which recognized privacy as a legally protected interest.⁵

A decade later came the Warren-Brandeis article.⁶ Concerned with the unwarranted publicizing of private matters, the authors examined a number of cases in which relief was afforded on the grounds of property right, implied contract, breach of confidence,

4. 46 Mich. 160, 9 N. W. 146 (1881). Although the declaration was in deceit, the court said (9 N.W. 146, 148, 149): "It would be shocking to our sense of right, justice and propriety to doubt even but that for such an act the law would afford an ample remedy. To the plaintiff the occasion was a most sacred one and no one had a right to intrude unless invited or because of some real and pressing necessity which it is not pretended existed in this case. The plaintiff had a legal right to the privacy of her apartment at such a time, and the law secures to her this right by requiring others to observe it, and to abstain from its violation."

5. But cf. *Lakin v. Gun, Wright* (Ohio) 14 (1831), (surprising man and woman in woods after conspiring with woman to get the man there; recovery denied); *Owen v. Henman*, 1 Watts & S. (Pa. 1841) (noise disturbing Sunday worshipper in church; recovery denied); *Bankus v. State*, 4 Ind. 114 (1853) (charivari party; recovery denied); *State v. Brown*, 69 Ind. 95 (1879); *Denis v. Leclerc*, 1 Mart. (O.S.) 297 (La. 1811), Note, 16 Tulane L. Rev. 639, 640 (1942).

6. "The Right to Privacy," 4 Harv. L. Rev. 193 (1890) has been frequently referred to as the outstanding example of the influence of legal periodicals on shaping the law.

or defamation. They concluded that these cases were really based on a broader principle entitled to separate recognition. If the common law copyright protected literary creations before publication, why should not the right of privacy prevent secrets whispered in the closet from being shouted from roof-tops? The lower courts in New York readily agreed. That year, the Supreme Court enjoined the use of a photograph surreptitiously taken of an actress in tights.⁷ When an actor, who was also a law student, refused to consent to the publication of his portrait along with that of another well-known one, in a newspaper popularity contest, the editor of the paper was enjoined.⁸ The Court of Appeals in *Schuyler v. Curtis*,⁹ recognized the existence of the right of privacy in the name and likeness of a person although it denied recovery in that case on the ground that the right did not survive a deceased person.

The reaction to this liberal view came quickly in repudiation of the new tort by the Michigan Supreme Court in *Atkinson v. Doherty*.¹⁰ The court denied an injunction to the widow of Col. John Atkinson, restraining the use of his name and portrait on a cigar label. The question of whether the right existed at common law need not have been decided. As in the *Schuyler* case, the court could have held that the right did not survive the deceased. It might have resorted to a recently formulated limitation¹¹ that since the Colonel was an eminent lawyer and politician, hence a public character, he had waived his right to privacy. Although it did find that the plaintiff was harmed, the Court would give no relief beyond the offer of its sympathy. Overlooking its own earlier case, the first American one recognizing the right, the Michigan Supreme

7. *Manola v. Stevens*, unreported, (see N.Y. Times, June 15, 18, 21, 1890) cited in 4 Harv. L. Rev. 193, 195. Marion Manola alleged that while playing in "Castle in the Air" at the Broadway Theatre in a role requiring her appearance in tights, she was photographed surreptitiously from one of the boxes. A preliminary injunction issued ex parte restraining the defendant from making use of the photograph.

8. *Marks v. Jaffa*, 6 Misc. 290, 26 N. Y. Supp. 908 (Super. Ct. 1893).

9. 147 N. Y. 434, 42 N. E. 22 (1895). Defendant association sought to erect a statue in memory of Mary M. Hamilton Schuyler as the "Typical Philanthropist." The work was to be exhibited at the Columbia Exposition in Chicago in 1893 alongside a bust of Susan B. Anthony, which was to be called, "Representative Reformer." A nephew and stepson of the late Mrs. Schuyler objected to the exhibition in such company.

10. 121 Mich. 373, 80 N. W. 285 (1899).

11. In *Corliss v. E. W. Walker*, 64 Fed. 280, 31 L. R. A. 283 (C.C.D. Mass. 1894), the widow of a well-known inventor sought to restrain publication of his portrait and biography. The court distinguished "public" from "private" characters. Ordinary people have the right to restrain such publication; but since Corliss sought and attained public recognition, he had surrendered his rights to privacy.

Court consigned the right to the limbo of *damnum absque injuria*.

Following this, the two most controversial cases appeared within a few years of each other. The facts were remarkably similar: each involved the unauthorized publication of the plaintiff's likeness for advertising purposes. In *Roberson v. Rochester Folding Box Co.*,¹² the majority of the New York Court of Appeals denied recovery principally because Blackstone, Kent and other common law commentators had not mentioned a right of privacy, and also because it might lay open the courts to a vast amount of litigation which would ultimately embrace the absurd. But in *Pavesich v. New England Mutual Life Insurance Co.*,¹³ the Georgia court found the silence of the common law not conclusive on its non-existence. If common law precedent would not support its recognition, natural law did. The right was implicit in constitutional guarantees of liberty. "Liberty includes the right to live as one will. . . . One may desire to live a life of seclusion."¹⁴ The controversy provoked by the New York decision was immediate and bitter. So sharp was the editorial criticism by the *New York Times*¹⁵ that one of the judges found it necessary to defend the holding in a law review article.¹⁶ The next session of the legislature promptly enacted a statute overruling the case.¹⁷ For almost a generation, recognition of the right has been in dispute.¹⁸ While today judicial controversy centers on the limitations of the right, rather than on its existence, the initial struggle has done much to shape the contours of the tort.

12. 171 N. Y. 538, 64 N. E. 442 (1902). Defendant, without knowledge or consent of the plaintiff, printed and circulated in stores, warehouses, saloons and other public places, about twenty-five thousand likenesses of the plaintiff, a young woman, with the words, "Flour of the Family" and the name of a milling company on each lithographic print.

13. 122 Ga. 190, 50 S. E. 68 (1905). A newspaper advertisement extolling the value of life insurance, used an easily recognized likeness of the plaintiff with caption indicating that he had life insurance, alongside a picture of a shabbily clad man which was labeled, "The Man Who Does Not Own Life Insurance." An injunction was granted.

14. 122 Ga. 190, 191, 50 S. E. 68, 70 (1905).

15. Aug. 23, 1902.

16. O'Brien, "The Right of Privacy," 2 Col. L. Rev. 438 (1902).

17. L. 1903, c. 132, § 2.

18. Against recognition: O'Brien, "The Right of Privacy," 2 Col. L. Rev. 438 (1902); Note, 2 Col. L. Rev. 486 (1902); Lisle, "The Right of Privacy (A Contra View)," 19 Ken. L. J. 137 (1931). In defense of a common law right: Warren and Brandeis, "The Right to Privacy," 4 Harv. L. Rev. 193 (1890); Larremore, "The Law of Privacy," 12 Col. L. Rev. 612 (1912); Ragland, "The Right of Privacy," 17 Ken. L. J. 85 (1929); Buxton, "The Right of Privacy," 35 Law Notes 25 (1931); Green, "The Right of Privacy," 27 Ill. L. Rev. 237 (1932); Kacedan, "The Right of Privacy," 12 B. U. L. Rev. 353, 600 (1932); Dickler, "The Right of Privacy," 70 U. S. L. Rev. 435 (1936); Nizer, "The Right of Privacy," 39 Mich. L. Rev. 526 (1941).

B. SCOPE OF THE RIGHT: PUBLICATIONS

Various classifications of the mass of cases and statutes on privacy have been suggested. Most of the situations fall into two categories: invasions by publication and intrusions upon private activities. Of these, cases involving publication have greater significance from the point of view of uniform legislation. They are not only more numerous than the other cases, but present problems which require immediate statutory solution. In permitting recovery, courts have been faced with the perennial problem of balancing the individual interest in peace of mind and freedom from emotional disturbance against the social concern in education and free dissemination of information. Four factors have emerged which delimit actionability of publicizing aspects of one's personality: (1) use of a name or likeness; (2) substantiality of the use; (3) ends served by publication; and (4) medium of publication. The quantum of each element in the mosaic necessary for a cause of action controls the extent to which the others need be present.

1. *Use of Name, Portrait, or Likeness*

What sort of appropriation of a name amounts to its use? Since only natural persons have feelings, the use of a corporate name infringes no right of privacy. In *Vassar College v. Loose-Wiles Biscuit Co.*,¹⁹ the defendant used on packages and advertisements a picture of a young woman in cap and gown waving the college pennant together with an imitation of the college seal in which the inscription, "Vassar College," was replaced by "Vassar Chocolates." The court denied an injunction, noting that not only was the college a corporation, "but a public institution, depending upon and inviting widespread publicity for the fullest return from the exercise of its functions as an institution of learning."²⁰ Except for Utah, which gives a statutory right of privacy to public institutions,²¹ this is the general rule and applies as well to partnership names.²²

Does an individual who permits his name to become part of a tradename surrender his right of privacy with respect to its subsequent business uses? In *Jaggard v. R. H. Macy & Co.*,²³ the

19. 197 Fed. 982 (W.D. Mo. 1912).

20. *Id.* at 985.

21. Utah Code Ann., §§ 103-4-7 (1943).

22. *Rosenwasser v. Ogoglia*, 172 App. Div. 107, 158 N. Y. Supp. 56 (2d Dept. 1916).

23. 176 Misc. 88, 26 N. Y. S. 2d 829 (Sup. Ct. 1941). And see *Tainer-Brice Co. v. Sims*, 174 Ga. 13, 161 S. E. 819 (1931) (use of surname in corporation tradename); *White v. William G. White, Inc.*, 160 App. Div. 709, 145 N. Y. Supp. 743 (1st Dept. 1914) (same).

plaintiff, Ginette Jaggard, a well-known dress designer, after doing business under the name, "Ginette de Paris," organized the "Ginette de Paris, Inc." Exclusive use of the adopted name was granted in connection with the sale of dresses to the corporation. The defendant used the name "Ginette de Paris," to sell patterns of dresses designed by the plaintiff. Relief was denied under the New York statute. However, in *Eliot v. Jones*,²⁴ President Eliot of Harvard consented to the display of his name on a set of books called the "Harvard Classics" and "Dr. Eliot's Five-Foot Shelf of Books." A rival publisher was enjoined, under the same statute, from publication of a cheaper edition called, "Dr. Eliot's Famous Five-Foot Shelf of the World's Greatest Books."

If the function of the right of privacy is protection against injury to feelings, and, not against monetary damages, then the result in the *Vassar* and *Jaggard* cases is correct and in the *Eliot* case, wrong. By consent to the use of his name and title as a trade-name, Dr. Eliot surrendered his right of privacy with respect to its subsequent business use on such books. No doubt there is a tort here. Since purchasers might be confused, the authorized publisher could have his competitor enjoined from continuing the unfair trade practice. The right of privacy should not be permitted to swallow the whole field of competitive torts. There is no remedy however for commercial practices such as were found in the *Vassar* case where there is no confusion of prospective purchasers and the parties are not competitors. The possibility of grave damage does exist in appropriation of institutional names. Although no right of privacy is involved, American jurisprudence is developing from the continental law of unfair competition a theory that such appropriations of an established name, even in the absence of confusion or competition, drain its glamour.²⁵

Whether the unwarranted use of less than a full name is actionable, has resulted in an apparent conflict of opinion. Thus the use of the surname "Pfaudler," was held not to invade privacy.²⁶ The court feared a flood of litigation from "Smiths," "Joneses" and "Does." Yet when the comedian Ed Wynn published a booklet of previously enacted radio dialogue, his announcer and foil, Graham McNamee, was able to enjoin its sale because of the unauthorized

24. 66 Misc. 95, 120 N. Y. Supp. 606 (Sup. Ct. 1910).

25. Schechter, "The Rational Basis of Trade-Mark Protection," 40 Harv. L. Rev. 813, 831-2 (1927).

26. *Pfaudler v. Pfaudler Co.*, 114 Misc. 477, 186 N. Y. Supp. 725 (Sup. Ct. 1921).

use of his first name.²⁷ The court found that in the particular context, use of a given name was sufficient to identify the plaintiff. The proper test should not be whether the name used is a full one, a surname or a first name, but whether its use under the circumstances is sufficient to call the plaintiff to the public mind.

Confusion still surrounds the use of stage names, noms-de-plume and maiden names. A federal district court held that the New York statute did not protect stage names.²⁸ The following year, the circuit court of appeals stated in dictum its disapproval of this view.²⁹ Married women may enjoin unauthorized use of their maiden names, both where the common law right is recognized, and under the New York statute.³⁰ But in an unusual case, relief was denied to an author who wrote under a nom-de-plume when he sued a publisher who chose to use the author's real name.³¹ "Word portrayals," however, are not actionable representations. In *Toscani v. Hersey*,³² the plaintiff's allegation that "Major Victor Joppolo" in the novel "A Bell for Adano" depicted plaintiff and his war experiences, was held insufficient under a statute defining the right in terms of use of a "portrait." Such a restriction is an arbitrary limitation on the right. The test should be formulated not on the basis of the means used to produce the result, but on whether there was identifiable representation.

27. *Uproar Co. v. National Broadcasting Co.*, 8 F. Supp. 358 (D.C. Mass. 1934) aff'd as mod., 81 F. 2d 373 (C.C.A. 1st 1936).

28. *Davis v. RKO Pictures*, 16 F. Supp. 195 (S.D. N.Y. 1936). Plaintiff who as a psychic, palmist and actress used the name "Cassandra" was denied recovery against producers of a motion picture called "Bunker Bean" in which there was a character named "Countess Cassandra." Not only did the two names materially differ, but both were derived from a mythical Greek prophetess. The court held neither had a better right than the other.

29. *Gardella v. Log Cabin Products Co.*, 89 F. 2d 891 (C.C.A. 2d 1937). Plaintiff had used the name "Aunt Jemima" as an actress in radio skits. Since the defendant had previously used the title as a trade name for its products, recovery was denied. In dictum the court found the New York statute's application to a public or stage name seemed "inevitable." "If the stage name has come to be closely and widely identified with the person who bears it the need for protection against unauthorized advertising will be as urgent as in the case of a private name; if anything, the need will be more urgent." *Id.* at 894.

30. *Melvin v. Reed*, 112 Cal. App. 285, 297 Pac. 91 (1931); *Bailey v. Bloomingdale Bros.*, 103 N. Y. L. J. 1533:3 (April 14, 1940).

31. *Ellis v. Hurst*, 70 Misc. 122, 128 N. Y. Supp. 144 (Sup. Ct. 1910), aff'd w.o. opinion, 145 App. Div. 918, 130 N. Y. Supp. 1110 (1st Dept. 1911). Edward S. Ellis wrote under the nom de plume, Lt. R. H. Jayne, two books which defendant published with both the real and assumed names on covers and wrappers. The court held the right to publish under a nom de plume included the right to use a true name.

32. 271 App. Div. 445, 65 N. Y. S. 2d 814 (1st Dept. 1946). See Note, 46 St. John's L. Rev. 73 (1946). Cf. Warren and Brandeis, "The Right of Privacy," 4 Harv. L. Rev. 193, 214 (1890).

The use of any name creates the risk of unintentionally appropriating one belonging to a living person. The circumstances of the use must determine liability. In *Kerby v. Hal Roach Studios*,³³ a synthetic *billet-doux* signed "Marion Kerby" was mailed to 1,000 men in Los Angeles to promote a film featuring a fictional character of that name. The plaintiff also was named "Marion Kerby" and was the only person so listed in the city's directories. She was deluged by telephone calls from hopeful males and had one visit from an irate wife who threatened to shoot her. The court held that her privacy was invaded, noting that "it could not but lead to misunderstandings between husbands and their wives who saw the letter and put the worst interpretation on it; it would arouse the expectations of lonesome males who were interested in the promised evening * * *."

What sort of representation of an individual amounts to a likeness? Not only photographs, but an X-ray picture of a woman's abdomen,³⁴ a statue,³⁵ and perhaps a wax figure,³⁶ are sufficient where the common law right is recognized. Under the New York statute, a mannikin, for which a model posed, has been held to be a "portrait or picture."³⁷ No accompanying name identifying the likeness is necessary,³⁸ and even where an incorrect name appeared in the caption, recovery has been permitted.³⁹ Camera accuracy is not required where reproductions by lithograph⁴⁰ or caricature⁴¹

33. 127 P. 2d 577 (Cal. App. 1942). Written in feminine hand on pink stationery, the note read (id. at 579):

"Dearest:

"Don't breathe it to a soul, but I'm back in Los Angeles and more curious than ever to see you. Remember how I cut up about a year ago? Well, I'm raring to go again, and believe me I'm in the mood for fun.

"Let's renew our acquaintanceship and I promise you an evening you won't forget. Meet me in front of Warners Downtown Theatre at 7th and Hill on Thursday. Just look for a girl with a gleam in her eye, a smile on her lips and mischief on her mind!

"Fondly,

"Your ectoplasmic playmate,

"Marion Kerby."

34. *Banks v. King Features Syndicate, Inc.*, 30 F. Supp. 352 (S.D. N.Y. 1939).

35. See *Schuyler v. Curtis*, 147 N. Y. 434, 42 N. E. 22 (1895).

36. See *Monson v. Tassaude, Ltd.*, (1894) 1 Q. B. (Eng.) 671 (recovery on libel theory).

37. *Young v. Grenecker Studios*, 175 Misc. 1027, 26 N. Y. S. 2d 357 (Sup. Ct. 1941).

38. *Munden v. Harris*, 153 Mo. App. 652, 134 S. W. 1076 (1911).

39. *Flake v. Greensboro News Co.*, 212 N. C. 780, 195 S. E. 55 (1938).

40. *Roberson v. Rochester Folding Box Co.*, 171 N. Y. 538, 64 N. E. 442 (1902).

41. *Tolley v. J. S. Fry & Sons*, (1930) 1 K. B. (Eng.) 671 (recovery on libel theory).

bear characteristic resemblance. And in an early case involving motion pictures, the plaintiff was allowed to recover where the only likeness used was that of an actor portraying him.⁴²

2. *Substantiality of the Use*

Not every unauthorized use of a name or likeness for prescribed purposes is actionable. The courts have qualified the right of privacy by the rule of *de minimis*. When a writer for a pulp magazine became so fascinated with the name, "Solly Krieger," that he used it upwards of one hundred times in a twenty page story, there was substantial use and no hesitation in permitting recovery by a professional prizefighter of that name.⁴³ But a single mention in the novel "Show Boat" which ran to three hundred and ninety-eight pages of the plaintiff's name, "little Wayne Damron," to add local color was not actionable.⁴⁴

More difficulty has been encountered in the application of the rule to motion pictures. When cameras begin to grind off set locations invariably someone in a crowd scene protests. In New York, when a plaintiff, whose name appeared on a sign attached to a factory building in a scene from a picture which purported to show actual locations of the white slave traffic, sought recovery, it was denied on the ground that the use was merely incidental.⁴⁵ A sailor who had posed for a Navy recruiting poster which appeared as background in nine feet of film in a picture of over eight thousand five hundred feet, could not recover.⁴⁶ It was stated that such a use did not even amount to a "picture or portrait" under the statute. Yet one close-up in a sightseeing film of a woman peddling bread and rolls on the street was held actionable.⁴⁷ There is a vast difference between what a plaintiff remembers of himself in a motion picture scene and the impression that he has made on the audience. In rul-

42. *Binns v. Vitagraph Co. of America*, 210 N. Y. 51, 103 N. E. 1108 (1913). The first sea rescue using wireless message was depicted with plaintiff radio operator portrayed by an actor. The film did not indicate that the operator was an actor.

43. *Krieger v. Popular Publications, Inc.*, 167 Misc. 5, 3 N. Y. S. 2d 480 (Sup. Ct. 1938).

44. *Damron v. Doubleday, Doran & Co., Inc.*, 133 Misc. 302, 231 N. Y. Supp. 444 (Sup. Ct. 1928).

45. *Merle v. Sociological Research Film Corp.*, 166 App. Div. 376, 152 N. Y. Supp. 829 (1st Dept. 1915). The film was titled, "The Inside of the White Slave Traffic."

46. *Freed v. Loew's, Inc.*, 175 Misc. 716, 24 N. Y. S. 2d 679 (Sup. Ct. 1940).

47. The picture was called, "Sight Seeing in New York with Nick and Tony." *Blumenthal v. Picture Classic*, 235 App. Div. 570, 257 N. Y. Supp. 800 (1st Dept. 1932), *aff'd*, 261 N. Y. 504, 185 N. E. 713.

ing out trivial and absurd infringements, the doctrine of substantiality is a desirable limitation of the right of privacy.

3. *Ends Served by Use*

a. *Public Interest*

Of the four limitations on the right suggested by Warren and Brandeis, the one most widely applied by the courts has been the first, *viz.*, that the right does not prohibit publication of any matter of public or general interest. It is also the most confused area in the field of privacy. Here the reconciliation of the conflict between individual and social interests, depends in large part on mores and value-patterns that vary with the court. What is legitimate public interest or concern? One generally accepted distinction is between fact and fiction. The unauthorized use of a name or likeness in a work of fiction is unprivileged.⁴⁸ Occasionally courts may overlook such use as unsubstantial.⁴⁹ Even then they are prone to distinguish legitimate fiction from the risqué story.⁵⁰ The core of confusion lies within the range of fact. If all publications of fact were held to be matters of public interest, then the tort of invading privacy would disappear into libel and slander. Several verbal distinctions have been attempted. One court has said that public interest does not mean mere curiosity.⁵¹ Another has found a difference between "ordinary inquisitiveness" and "unscrupulous abuse" of a person's privacy.⁵² The earliest test to find favor was the distinction between public and private personages. Information about public characters was said to be privileged since by pursuing an occupation which called for general approval or patronage, they had renounced the right to live screened lives. One can agree with such applications of the defense as to the use of "Culbertson System" to describe a technique of bridge playing perfected by one of the

48. *Krieger v. Popular Publications, Inc.*, 167 Misc. 5, 3 N. Y. S. 2d 480 (Sup. Ct. 1938).

49. *Swacker v. Wright*, 154 Misc. 822, 277 N. Y. Supp. 296 (Sup. Ct. 1935). The district attorney's secretary was called "Swacker" in a film. Plaintiff, Frank Swacker, formerly special assistant to the United States Attorney General in prosecuting anti-trust cases, was denied recovery.

50. *Semler v. Ultem Publications, Inc.*, 170 Misc. 551, 9 N. Y. S. 2d 319 (City Ct. N.Y. 1938) (professional model recovers for publication of photograph of self in negligée in magazine which, as court observed, was devoted to risqué stories and semi-draped women).

51. *Metter v. Los Angeles Examiner*, 35 Cal. App. 2d 304, 95 P. 2d 491 (1939).

52. *Themo v. New England Newspaper Pub. Co.*, 306 Mass. 54, 27 N. E. 2d 753 (1940) (recovery denied plaintiff photographed in company of police captain where no special damage alleged).

litigants.⁵³ But the doctrine has been so extended as to deny any protection to those in the public eye. Thus a well-known actress who alleged the expenditure of large sums to publicize herself as a legitimate performer, was denied recovery against the owner of a theatre sponsoring burlesque shows who exhibited a life-size photograph of the plaintiff among nude and semi-draped likenesses of his performers.⁵⁴

"Persons who expose themselves to public view for hire cannot expect to have the same privacy as the meek, plodding, stay-at-home citizen. The glamour, genuine or artificial, of that business, removes the participants therein from the average citizen."

Apart from overextended application, the "public personage" test is unsound. Implicit in the rule is the theory of waiver or consent, yet it can hardly be applied to explain publications about persons whose participation in events of general interest is involuntary,⁵⁵ or whose only connection with the event is some relationship to the actor and who have not participated at all.⁵⁶ The focus of a working rule should be not persons, but matters of public interest. A realistic approach to its formulation would involve balancing the individual interest in a private life against public interest in news, information and education.

Contrary to the expectations of Warren and Brandeis, public interest in news has provided a virtually impregnable defense to the right of privacy. What sort of stories constitute news? Within a single edition of a newspaper there is a vast range of timeliness between the front-page headline and the inner page human interest or rotogravure or Sunday supplement articles. And what is to be done with items in current magazines, motion picture reenactments

53. *Downes v. Culbertson*, 153 Misc. 14, 275 N. Y. Supp. 233 (Sup. Ct. 1934) (such use held no defense in unfair competition action).

54. *Martin v. F. I. Y. Theatre Co.*, 26 Ohio L. Abs. 67, 10 Ohio Ops. 338 (1938) (the actress was Mary Martin); *Paramount Pictures v. Leader Press*, 24 F. Supp. 1004 (D.C. W.D. Okl. 1938) (injunction denied for use of names and pictures of actors in advertisements). Cf. *Ruth v. Educational Films, Inc.*, 194 App. Div. 708, 1 N. Y. Supp. 948 (1st Dept. 1937).

55. *Jones v. Herald Post*, 230 Ky. 227, 18 S. W. 2d 972 (1929) (recovery denied for newspaper photograph of plaintiff who was in company of husband when he was stabbed to death on street).

56. *Hillman v. Star Pub. Co., Inc.*, 64 Wash. 691, 117 Pac. 594 (1911) (recovery denied for newspaper photograph of plaintiff on indictment of father); *Martin v. New Metropolitan Fiction Co., Inc.*, 139 Misc. 290, 248 N. Y. Supp. 359 (Sup. Ct. 1931), rev'd, 237 App. Div. 863, 260 N. Y. Supp. 972 (3d Dept. 1932) (recovery denied for publication of photograph in courtroom of murder victim's mother in connection with article in *True Detective Mysteries*).

57. 34 F. Supp. 19 (S.D. N.Y. 1938), aff'd, 113 F. 2d 806 (C.C.A. 2d 1940).

and radio dramatizations of past events? Three cases have raised the question in a familiar pattern: do persons who have retired from the public eye for considerable time regain the right of privacy enjoyed by the obscure? In *Sidis v. F-R Pub. Corp.*,⁵⁷ the magazine, "New Yorker," published a biographical sketch of the plaintiff under the caption, "April Fool," in a department called, "Where Are They Now?" Twenty-five years previously, the plaintiff was a much publicized prodigy. At the age of twelve, he lectured to professors on the fourth dimension. At sixteen, he was graduated from Harvard. The article described in merciless detail his present obscurity as a lowly paid clerk who lived in a shabby hall bedroom and as a hobby collected trolley transfers. The court denied recovery. It conceded that the plaintiff had gone to pitiable lengths to escape publicity, but found a legitimate public interest in "the misfortunes and frailties of others." In *Melvin v. Reid*,⁵⁸ a motion picture called "The Red Kimono" sought to dramatize the former life of the plaintiff, once a prostitute and defendant in a famous murder trial. She had since married and lived an exemplary life. The court found no infringement of her right to privacy because the details of the murder trial were already public record. But because of the use of her maiden name, recovery was permitted under a clause in the state constitution guaranteeing the right to pursue happiness. In *Mau v. Rio Grande Oil, Inc.*,⁵⁹ a radio serial entitled, "Calling All Cars," reenacted a holdup and shooting in which the plaintiff was the victim. The plaintiff alleged that he underwent such mental anguish that next day he lost his chauffeur's job. The court denied a motion to dismiss the complaint, and stated that there is a point beyond which past events lose their privilege as news. All three cases involved past events. Clearly they do not turn on the factor of timeliness. It is difficult to find more public concern in one story than in another. Is the shame of being identified as an accused murderess and former prostitute in the *Melvin* case the same as the annoyance of being pointed out as an ex-prodigy in the *Sidis* case? In the *Mau* case, the allegation of special damage, so immediate and extreme, probably moved the court. If at all, the cases may be distinguished in terms of the variation of the individual interest in privacy.

The element of time in the case of those involved in the news may make impossible the requirement that consent be secured in advance. The same cannot be said of publications which are merely

58. 112 Cal. App. 285, 297 Pac. 91 (1931).

59. 28 F. Supp. 845 (N.D. Cal. 1939).

informative. Yet an Alaska court denied an injunction against taking motion pictures of a projected flight over the North Pole after it had been alleged that such rights had been sold to another company and the receipts were being used with other private capital to make the venture financially possible.⁶⁰ The court found the expedition, "surrounded and clothed with a remarkable public interest." Judicial confusion surrounding public interest in information is itself remarkable in cases involving motion pictures of sports figures. Babe Ruth was denied recovery for films exhibiting his home-run technique,⁶¹ while a golfer and a New York toreador were found to have their privacy invaded by similar pictures demonstrating respectively trick shots⁶² and the art of throwing a bull.⁶³

Strangely enough, public interest in education is given least consideration as a privilege. In *Almind v. Sea Beach Ry.*,⁶⁴ unauthorized photographs of the plaintiff demonstrating the safest way to enter and leave a street car, were found to invade her right of privacy. A series of cases involving medical photography has raised the issue more sharply. No question exists where the pictures are exhibited generally for pornographic purposes.⁶⁵ But in *Clayman v. Bernstein*,⁶⁶ an injunction was granted, in the absence of publication or communication, against the use of private photographs taken by her physician, without permission, of a woman's facial disfiguration. And the State's Attorney General has indicated that the New York statute protects cancer patients against unauthorized public exhibitions for educational purposes of their photographs.⁶⁷ In weighing an individual's interest in this kind of case against the public interest, such factors should be considered as: the degree of value of the likeness for prevention and treatment of disease; the extent to which it will be exhibited to an audience

60. *Smith v. Surratt*, 7 Alaska 416 (1926).

61. *Ruth v. Educational Films, Inc.*, 194 App. Div. 893, 184 N. Y. Supp. 948 (1st Dept. 1920). The films were called, "Over the Fence" and "Babe Ruth, How He Makes His Home Runs."

62. *Redmond v. Columbia Pictures Corp.*, 253 App. Div. 708, 1 N. Y. S. 2d 643 (1st Dept. 1937), aff'd, 277 N. Y. 707, 14 N. E. 2d 636 (1938).

63. *Franklin v. Columbia Pictures Corp.*, 246 App. Div. 35, 248 N. Y. Supp. 96 (1st Dept. 1935), aff'd, 271 N. Y. 554, 2 N. E. 2d 691 (1936). The film featured Sidney Franklin and was called "Throwing the Bull."

64. 157 App. Div. 230, 141 N. Y. Supp. 842 (2d Dept. 1913).

65. Cf. *Feeney v. Young*, 191 App. Div. 501, 181 N. Y. Supp. 481 (1st Dept. 1920) (plaintiff recovers for exhibition to general patronage in film called "Birth" of pictures showing her Caesarian operation which she consented orally to be shown only to medical societies).

66. 38 Pa. D. & C. 543 (1940).

67. *Ops. Att'y Gen.* (N.Y. 1934), 374.

of a limited and professional character;⁶⁸ the uniqueness of the subject for the purpose; and the difficulty of obliterating elements that would identify the subject. Thus, in the *Almind* case, any person might have been recruited for the accident prevention photographs; but in *Clayman v. Bernstein*, only the plaintiff's face could subserve science.

b. *Advertising or Trade Purposes*

In jurisdictions where either the common law or statutory right of privacy is recognized, the unauthorized use of a name or likeness for advertising or trade purposes is actionable. Where the statutory right exists, a use must be made for this purpose or there is no cause of action. In deciding what is such a purpose, no difficulty is presented by such invasions as the unauthorized use of a name or photograph in an advertisement, or a purported recommendation, indorsement or testimonial.⁶⁹ Occasionally, closer questions arise as, for example, the illustrative use of an actress' photograph in a five-and-ten cent store locket.⁷⁰ But confusion results from the fact that most uses of names and likenesses are rarely for a single purpose. Newspapers and magazines may publish articles to satiate the public appetite for current information and enlightenment, but they also do so to increase their circulation and profits. Is not every news item then a publication for trade purposes?⁷¹ In answering this in the negative, courts must first determine what the social interest is and balance the commercial purpose against the publication's value as news, information or education. The resultant of this process must then be weighed against the individual

68. But see *Griffin v. Medical Soc.*, 11 N. Y. S. 2d 109 (Sup. Ct. 1939) (recovery for photograph in medical journal).

69. E.g., *Foster-Milburn Co. v. Chinn*, 134 Ky. 424, 120 S. W. 364 (1909) (picture and forged letter of senator used in booklet by kidney pill manufacturer); *Mackenzie v. Soden Mineral Springs Co.*, 27 Abb. N. C. 402, 18 N. Y. Supp. 240 (1891) (pretended facsimile of physician's signature used on drug label and advertisement). But cf. *Clark v. Freeman*, 11 Beav. 112, 50 Eng. Rep. 759 (1848) (prominent physician, Sir James Clarke, denied injunction against druggist selling "Sir J. Clarke's Consumption Pills"); *Dockrell v. Dougall*, 80 L. T. (N.S.) 556 (1899) (id.).

70. *Lane v. F. W. Woolworth Co.*, 171 Misc. 66, 11 N. Y. S. 2d 199 (Sup. Ct. 1939), aff'd, 256 App. Div. 1065, 12 N. Y. S. 2d 352 (1st Dept. 1939). In rejecting defendant's contention that use of plaintiff's picture merely invited purchaser to insert her own favorite photograph, the court said (11 N.Y.S. 2d at 200): "The photograph was obviously used to bring attention to the lockets on display, to make them more attractive. This is a use for 'advertising' and for 'trade' purposes * * *."

71. Cf. *Sidis v. F-R Pub. Co., Inc.*, 113 F. 2d 806, 810 (C.C.A. 2d 1940): "Though a publisher sells a commodity, and expects to profit from the sale of his product, he is immune from the interdict of sections 50 and 51 so long as he confines himself to the unembroidered dissemination of facts."

interest in privacy. Thus typical judicial efforts to arrive at a stereotyped definition of "advertising or trade purposes," valid for all cases, is foredoomed. However, this tendency is most marked in jurisdictions having the statutory right because the legislative language makes of this purpose a single test. The absurdity of the rigid formula is demonstrated by one case holding that the use of the plaintiff's photograph in a humorous cartoon would not be a trade purpose if the cartoon appeared in a single newspaper, but the syndicated sale of the cartoon to a number of them made the use one for "trade purposes."⁷² Making a commercial purpose the sole criterion for the existence of an invasion, unduly restricts the scope of the tort and dangerously expands it into areas protected by the more systematic rules of unfair competition.

4. *Medium of Publication*

Independent of the ends served by the publication, a factor in determining the existence of an invasion of privacy, is the particular medium used, whether newspaper, magazine, motion picture or radio. The almost absolute privilege conferred on news because of great public concern in current events and the impossibility of obtaining consent in advance extends almost to the entire contents of a newspaper. In this atmosphere of immediate public interest, the privilege of the front page bulletin is frequently carried over to the weird story in the Sunday supplement. It manifests itself in one way as justification for the inclusion of names and photographs, sometimes only tenuously related to the matter reported. Thus a well-known Hindu musician was denied recovery for the use of his photograph in a magazine supplement story called "I Saw the Famous Rope Trick (But It Didn't Really Happen)."⁷³ Neither a mother nor a daughter could recover for publication of their pictures in connection with stories concerning principals in criminal proceedings in which they had absolutely no part.⁷⁴ Yet in *Miller v. Madison Square Garden Corp.*,⁷⁵ the plaintiff, a non-participant, recovered for the use of his name and photograph where the medium of publication was the official program of a certain sporting event.

72. *McNulty v. Press Pub. Co.*, 136 Misc. 833, 241 N. Y. Supp. 29 (Sup. Ct. 1930).

73. *Lahiri v. Daily Mirror*, 162 Misc. 776, 295 N. Y. Supp. 382 (Sup. Ct. 1937).

74. *Martin v. New Metropolitan Fiction Co., Inc.*, 139 Misc. 290, 248 N. Y. Supp. 359 (Sup. Ct. 1931), rev'd, 237 App. Div. 863, 260 N. Y. Supp. 972 (3d Dept. 1932); *Hillman v. Star Pub. Co., Inc.*, 64 Wash. 691, 117 Pac. 594 (1911).

75. 176 Misc. 714, 28 N. Y. S. 2d 811 (Sup. Ct. 1941).

Another way the atmosphere effect of newspaper publication extends the news privilege, is in the condonation by the courts of incorrect representations and deliberate alterations. In *Jones v. Herald Post Co.*,⁷⁶ where the plaintiff's husband was murdered in a street robbery, the attribution of an absurdly heroic statement, which had never been made, to the plaintiff, did not move the court to find an invasion of her privacy. And where a woman had posed at an airport, in a group picture of five, including husband and chauffeur, the publication of the photograph of the chauffeur and herself with the others deleted, in connection with a story of her husband's alienation of affections action against the chauffeur and divorce proceedings against her, was held not to violate her right of privacy.⁷⁷

Although no element of timeliness exists, courts will investigate the nature of the publication to find a privilege where invasions by magazines are involved. The National Police Gazette used the photograph of the plaintiff, a high diver, together with those of four other female vaudeville performers, under the caption, "Five of a Kind on This Page. Most of Them Adorn the Burlesque Stage; All of Them are Favorites of the Bald-headed Boys." Recovery was denied.⁷⁸ The court found the Police Gazette to be an "informative" periodical and hence outside the prohibition of the New York statute, this despite its devotion to pictures of pugilists, wrestlers, athletes, vaudeville performers, and prize dogs.

While no difficulty is encountered in permitting recovery for unauthorized use of a likeness when motion pictures involve fictional plays,⁷⁹ or even factual scenes exhibited for advertising⁸⁰ or sex⁸¹ purposes, courts have generally denied motion pictures any privilege. This has been done on the theory that while a reader buys his newspaper or periodical to be informed, when he goes to the pictures he pays to be amused. Even informative films must be viewed in the light of this mental set. Certainly this doctrine is absurd in the case of newsreels. If the inability to secure consent beforehand

76. 230 Ky. 227, 18 S. W. 2d 972 (1929).

77. *Thayer v. Worcester Post Co., Inc.*, 284 Mass. 160, 187 N. E. 292 (1933). Cf. *Middleton v. News Syndicate Co., Inc.*, 162 Misc. 516, 295 N. Y. Supp. 120 (Sup. Ct. 1937) (recovery denied to unemployed model described as hotel cigaret girl in column called "The Inquiring Photographer" since column not used for advertising or trade purposes).

78. *Colyer v. Richard K. Fox Pub. Co.*, 162 App. Div. 297, 146 N. Y. Supp. 999 (2d Dept. 1914).

79. *Melvin v. Reed*, 112 Cal. App. 285, 297 Pac. 91 (1931).

80. *Kunz v. Allen*, 102 Kan. 883, 172 Pac. 532 (1918).

81. Cf. *Feeney v. Young*, 191 App. Div. 501, 181 N. Y. Supp. 481 (1st Dept. 1920).

justifies a high degree of privilege for newspapers, the same privilege should exist for newsreels. Not only is time, in either case equally scarce, but the difficulty of securing waivers in the latter case increased many fold. A news story may describe a crowd, parade or riot without names or likenesses; a newsreel cannot. While this tendency has persisted, courts show signs of abandoning it. Thus such a human interest item as a newsreel involving corrupt reducing women, one of whom later objected, was held not to violate her right of privacy.⁸² And scenes of a woman attorney-turned-amateur detective, in the act of assisting the police to solve a murder mystery, were similarly held privileged.⁸³

By analogy to the old distinction between libel and slander, it has at times been recommended as a prerequisite to redress for invasion of privacy by oral publication that proof be made of special damages, or that recovery be denied under any circumstances for oral violation of the right.⁸⁴ The ancient maxim, *ora volant, verba manent*, hardly meets the situation created by the modern radio broadcast. Nevertheless, the requirement of special damages still does appear necessary for recovery.⁸⁵

C. INTRUSIONS UPON PRIVATE AFFAIRS

The publication of some aspect of personality for commercial purpose was probably the kind of tort contemplated by Warren and Brandeis. This is the only right of privacy protected by existing statutes. However, in most states recognizing the common law right, publication is not the only method by which privacy may be invaded.⁸⁶ If the gist of the action is the emotional disturbance produced by unreasonable interference with peace of mind, other means calculated to bring about this result should also be actionable. Thus courts have permitted recovery in various situations involving intrusions upon private affairs:

Eavesdropping. Unauthorized interception of private conversa-

82. *Sweenek v. Pathe News*, 16 F. Supp. 746 (E.D. N.Y. 1931).

83. *Humiston v. Universal Film Mfg. Co.*, 101 Misc. 3, 167 N. Y. Supp. 98 (Sup. Ct. 1917), *aff'd*, 182 App. Div. 882, 168 N. Y. Supp. 1112 (1st Dept. 1918).

84. Cf. *Gregory v. Bryan-Hunt Co.*, 295 Ky. 345, 174 S. W. 2d 510 (1943), Note, 30 Corn. L. Q. 398 (1945); Warren and Brandeis, "The Right to Privacy," 4 Harv. L. Rev. 193, 217 (1890).

85. *Mau v. Rio Grande Oil, Inc.*, 28 F. Supp. 845 (N.D. Cal. 1939).

86. See *McDaniel v. Atlanta Coca-Cola Bottling Co., Inc.*, 60 Ga. App. 92, 102, 2 S. E. 2d 810 (1939): " * * * we think that under the decisions a person's privacy is invaded, in a case like the present, even though the information obtained be restricted to the immediate transgressor. Publication or commercialization may aggravate, but the individual's right to privacy is invaded and violated nevertheless in the original act of intrusion."

tions by dictaphone⁸⁷ or wiretapping⁸⁸ notwithstanding the absence of publication has been held to invade privacy.

Impersonations. In the absence of commercial purpose, the unauthorized use of another's name has frequently been held actionable. Thus affixing for political advantage another's name to a telegram urging gubernatorial veto of a certain bill,⁸⁹ or using the name of a national figure to endorse a local party,⁹⁰ certainly infringe on the right of privacy. Injunction has also been granted against a wife and vital statistics bureau to restrain them from using the husband's name as father of a child shown to be a bastard.⁹¹ However, courts have generally denied such relief to a wife who seeks to restrain her husband and his companion from holding themselves out as married.⁹²

Publicizing bad debts. Courts have ordinarily protected the sensitive debtor against his irate creditor who in order to collect invokes publicity. The question of degree of undue publicity is not difficult when a garageman notifies a former customer that his payment is past due by means of a sign, five feet by eight, posted in his window.⁹³ Closer questions perhaps are encountered when the disappointed creditor leaves large yellow cards, advising prompt payment, conspicuously scattered about the debtor's residence, or mails bright red envelopes to him, plainly marked on the outside, "For Collecting Bad Debts."⁹⁴ When accounts are advertised for sale a different question is presented. No invasion of privacy was found where a creditor distributed orange-colored handbills, listing by name, address and amount due, the plaintiff and twenty-three other debtors under the heading, "Accounts For Sale."⁹⁵ Although the information was correct, resort to such unorthodox methods to effect assignments is obviously calculated to enlist public opinion as a collection agent. A disappointed creditor's threat of garnishment made to the debtor's employer probably is not unjustified.⁹⁶

87. *McDaniel v. Atlanta Coca-Cola Bottling Co., Inc.*, 60 Ga. App. 92, 2 S. E. 2d 810 (1939).

88. *Rhodes v. Graham*, 238 Ky. 225, 37 S. W. 2d 46 (1931).

89. *Hinish v. Meier & F. Co.*, 166 Ore. 482, 113 P. 2d 438 (1941).

90. See *State ex rel. LaFollette v. Hinkle*, 131 Wash. 86, 229 Pac. 317 (1924). Cf. *Schwartz v. Edrington*, 133 La. 235, 62 So. 660 (1913).

91. *Vanderbilt v. Mitchell*, 72 N. J. Eq. 910, 67 Atl. 97 (1907).

92. E.g., *Baumann v. Baumann*, 250 N. Y. 612, 166 N. E. 344 (1929); *Hodecker v. Strickler*, 20 App. Div. 245, 46 N. Y. Supp. 808 (4th Dept. 1897).

93. *Brents v. Morgan*, 221 Ky. 765, 299 S. W. 967 (1927).

94. *Thompson v. Adelberg & Berman, Inc.*, 181 Ky. 487, 205 S. W. 558 (1918) (recovery allowed).

95. *Judevine v. Benzies-Montanye Fuel & Warehouse Co.*, 222 Wis. 512, 269 N. W. 295 (1936).

96. See *Lewis v. Physicians and Dentists Credit Bureau*, 127 Wash. 252, 177 P. 2d 896 (1947), Note, 22 Wash. L. Rev. 229 (1947).

Courts reluctant to recognize privacy occasionally allow recovery for libel. Where a pharmacist inserted, "Wanted, E. B. Zier, M.D., to pay a drug bill," in a want-ad column, an action in libel was found sufficient although the words concededly were not defamatory.⁹⁷

Crime detection. Usually separate statutes govern the return by police of suspects' photographs, measurements and fingerprints. Although some doubt exists concerning photographs,⁹⁸ retention of fingerprints, notwithstanding the plaintiff's innocence, generally is held not to invade his privacy.⁹⁹ It is not clear whether secret shadowing by private detectives infringes privacy.¹⁰⁰ Certainly "rough" shadowing, of the open variety and without any attempt at secrecy, is actionable.¹⁰¹

Intrusions upon private quarters. At two points the right of privacy converges with real property law. Courts early demonstrated a willingness to protect the privacy of quarters against intrusions, particularly when the occupant is a female and the hour late.¹⁰² They have often resorted to trespass *quare clausum* in cases which can only be explained as violations of privacy rather than possession. On the basis of property rights alone, an adjoining landowner cannot be enjoined from erecting and maintaining windows overlooking a plaintiff's property.¹⁰³ Yet recovery has been allowed

97. Zier v. Hofflin, 33 Minn. 66, 21 N. W. 862 (1885); see Muetze v. Tuteur, 77 Wis. 236, 46 N. W. 123 (1890).

98. See State ex rel. Mavity v. Tyndall, 66 N. E. 2d 755 (Ind. 1946), Note, 26 B. U. L. Rev. 526 (1946).

99. Bartletta v. McFeely, 107 N. J. Eq. 141, 152 Atl. 17 (1930), aff'd, 109 N. J. Eq. 241, 156 Atl. 658 (1931); Miller v. Gillespie, 196 Mich. 423, 163 N. W. 22 (1917); Hodgeman v. Olsen, 86 Wash. 615, 150 Pac. 1122 (1915); Downs v. Swann, 111 Md. 53, 73 Atl. 653 (1909); see Mabry v. Kettering, 89 Ark. 551, 117 S. W. 746 (1909). But cf., State ex rel. Reed v. Harris, 348 Mo. 426, 153 S. W. 2d 834 (1941).

100. See People v. Weiler, 179 N. Y. 46, 71 N. E. 462 (1904) (secret shadowing not disorderly conduct within penal statute).

101. Schultz v. Frankfort M. Accident & P. G. Ins. Co., 151 Wis. 537, 159 N. W. 386 (1913).

102. Byfield v. Candler, 33 Ga. App. 275, 125 S. E. 905 (1924) (passenger aboard vessel enters woman's stateroom at night and attempts to have sexual intercourse); Emmeke v. De Silva, 293 Fed. 17 (C.C.A. 8th 1923) (hotel detective accuses woman in room with husband at night); McGlone v. Hauger, 56 Ind. App. 243, 104 N. E. 116 (1913) (housekeeper forced to leave room by window when employer enters late at night to ravish her); Engle v. Simmons, 148 Ala. 92, 41 So. 1023 (1906) (persistent collector by constant interrogation causes premature birth to pregnant woman); Newell v. Whitcher, 53 Vt. 589, 38 Am. Rep. 703 (1880) (entry by householder into guestroom in middle of night to solicit sexual intercourse with blind music teacher).

103. Schafer v. Baker, 16 App. D. C. 213 (1900); Turner v. Spooner, (1861) 30 L. J. Ch. (N.S.) 801; Bryant v. Sholars, 104 La. 786, 29 So. 350 (1901).

for invasion of privacy occasioned by a neighboring county jail and its profane inmates,¹⁰⁴ and by an elevated railroad and peeping passengers.¹⁰⁵

The almost infinite variety¹⁰⁶ of instances in which privacy may be invaded even in the absence of commercial purpose or publication, requires a more general definition of the right than it has heretofore been given by statute.

D. PROBLEM OF CONSENT

In jurisdictions recognizing the common law right of privacy, the right may be lost, like all personal ones, by estoppel,¹⁰⁷ the doctrine of unclean hands,¹⁰⁸ or consent. Consent may be written or oral; but when oral, courts will not seize upon words divorced from surrounding circumstances to find acquiescence. Where a patient was hospitalized, allegedly because of drinking a bottled beverage, her statement to the defendant's attorney that he was free to make any investigation about her to establish the truthfulness of her claim, did not authorize him to install a dictaphone in her room.¹⁰⁹ Consent may also be implied from conduct and surrounding circumstances. But in applying the theory of waiver to public persons on the ground that they have surrendered their right of privacy, courts have been indiscriminate.¹¹⁰ Many jurisdictions have modified the public personage rule to the extent of protecting them against unauthorized uses of names and likenesses unrelated to their public life.¹¹¹

104. *Pritchett v. Knox County*, 42 Ind. App. 3, 85 N. E. 32 (1908).

105. *Moore v. N. Y. Elevated Ry. Co.*, 130 N. Y. 523, 29 N. E. 997 (1892).

106. Cf. *Bednarik v. Bednarik*, 18 N. J. Misc. 633, 16 A. 2d 80 (1940) (to require wife accused of adultery to submit to blood test for paternity of child would invade her privacy).

107. *Widdemer v. Hubbard*, 19 Phila. 263, 44 Phila. Leg. Int. 252 (1887) (writer of letter by publishing it loses right to injunction against subsequent publication by another).

108. In *Western U. Teleg. Co. v. McLaurin*, 108 Miss. 273, 66 So. 739 (1914), plaintiff was denied recovery for disclosure of telegrams sent him by a prostitute since "publication of the telegrams did not disclose the character of the sender. It was necessary for the plaintiff's case that he should disclose her business * * *. He could not 'open his case' without confessing his criminal intimacy with the courtesan, and it was his relations with the woman that brought about his shame—and it was this shame that produced the injury or actual damage."

109. *McDaniel v. Atlanta Coca-Cola Bottling Co., Inc.*, 60 Ga. App. 92, 2 S. E. 2d 810 (1939).

110. See note 54, *supra*.

111. *Foster-Milburn Co. v. Chinn*, 134 Ky. 424, 120 S. W. 364 (1909). Cf. *Eliot v. Jones*, 66 Misc. 95, 120 N. Y. Supp. 606 (Sup. Ct. 1910); *Edison v. Edison Polyform Co.*, 73 N. J. Eq. 136, 67 Atl. 392 (1907).

The New York,¹¹² Utah¹¹³ and Virginia¹¹⁴ statutes require consent in writing. In New York, the courts at first construed the statute strictly,¹¹⁵ and neither consent of an oral nature,¹¹⁶ nor a course of conduct from which consent might be implied,¹¹⁷ was recognized as a defense. Later, in reaction to the manifest injustice of this, oral consent and estoppel were accepted in various ways as partial defenses. Where the plaintiff had orally consented in advance, verdicts of six cents were either found to be not against the weight of evidence,¹¹⁸ or even directed.¹¹⁹ Both oral¹²⁰ and implied consent¹²¹ were later accepted as pleas in mitigation of damages. And where injunctive relief was sought, the court has refused to act in the face of conduct amounting to consent on the theory of unclean hands.¹²²

The parol evidence rule applies where written consent has been obtained. Thus, oral understandings limiting the scope of the writing may not be pleaded.¹²³ But consent may be limited or conditional in view of surrounding circumstances.¹²⁴ It has been held that

112. N. Y. Civil Rights Law §§ 50, 51.

113. Utah Code Ann. §§ 103-4-7—103-4-9 (1943).

114. Va. Code § 5782 (Michie et al., 1942).

115. *Porter v. American Tobacco Co.*, 140 App. Div. 871, 125 N. Y. Supp. 710 (2d Dept. 1910) (failure to obtain written consent must be pleaded and proved as part of plaintiff's cause of action).

116. *Almind v. Sea Beach Ry.*, 157 App. Div. 230, 141 N. Y. Supp. 842 (2d Dept. 1913) (plaintiff recovers although oral consent was given prior to publication of photographs).

117. *Hammond v. Crowell Pub. Co.*, 253 App. Div. 205, 1 N. Y. S. 2d 728 (1st Dept. 1938).

118. *Miller v. Madison Square Garden Corp.*, 176 Misc. 714, 28 N. Y. S. 2d 811 (Sup. Ct. 1941) (directed verdict of six cents for plaintiff who gave oral consent and admitted suffering no shame or humiliation).

119. *Harris v. H. W. Gossard Co.*, 194 App. Div. 688, 185 N. Y. Supp. 861 (1st Dept. 1921) (verdict of six cents held sufficient after oral consent by plaintiff established).

120. *Buscello v. Conde Nast Pub., Inc.*, 173 Misc. 674, 19 N. Y. S. 2d 129 (Sup. Ct. 1940) (oral consent of parent).

121. Cf. *Sidney v. A. S. Beck Shoe Corp.*, 153 Misc. 166, 274 N. Y. Supp. 559 (Sup. Ct. 1934) (on motion to strike, defendant allowed to plead in mitigation of damages theatrical custom of encouraging advertising publicity for stars, after use of Sylvia Sidney's name and photograph on shoe advertisement); *Lane v. F. W. Woolworth Co.*, 171 Misc. 66, 11 N. Y. S. 2d 199 (Sup. Ct. 1939), *aff'd*, 256 App. Div. 1065, 12 N. Y. S. 2d 352 (1st Dept. 1939) (fact that plaintiff actress made no demand before suit and defendant did not know consent had not been obtained held good partial defense in mitigation of at least exemplary damages).

122. *Wendell v. Conduit Mach. Co.*, 74 Misc. 201, 133 N. Y. Supp. 758 (Sup. Ct. 1911) (plaintiff voluntarily posed for photograph knowing purpose for which it was to be used).

123. *Merendi v. General Cigar Co.*, 103 N. Y. L. J., 1113:6 (March 12, 1940).

124. *Young v. Greneker Studios*, 175 Misc. 1027, 26 N. Y. S. 2d 357 (Sup. Ct. 1941) (professional model who posed at direction of her employer for defendant, solely to enable him to make a mannikin for the em-

consent is a bare license or permission which may be revoked at any time.¹²⁵ Thus under the New York statute, a perfume manufacturer who after obtaining written consent of the plaintiff, had expended large sums in exploiting the trade name, "Parfum Mary Garden" was enjoined from further use of the name when twenty years later she changed her mind.¹²⁶ Clearly the result is unjust. Whether or not consent is a revocable license, a court of equity has discretion to refuse to act when the plaintiff's conduct is characterized by estoppel, laches and unclean hands.

The statutory requirement of written consent, designed to protect unwary plaintiffs, has operated too frequently to ensnare innocent defendants. Since the statutory protection is for the benefit of the individual, he should be considered to have the privilege of waiving it. The requirement of a writing may diminish fraudulent defenses; but it also increases the opportunities for fraudulent claims. The central issue should be not the form of consent, but its authenticity. Distinctions between written and oral evidence of consent, without affecting admissibility, may properly be considered to influence its weight.

E. SURVIVAL OF THE RIGHT

More confusion surrounds the question of survival of the right than any other of its aspects. Uniform legislation would solve all of the three¹²⁷ problems involved: (1) Where invasion takes place during a person's lifetime, may an action be brought by others in his name after death? (2) Does an action, commenced for invasion during lifetime, abate with the death of either the plaintiff or the defendant? (3) Where an invasion occurs after death, can surviving relatives or representatives recover in their own rights?

(1 and 2) Where there are no survival statutes, the answer to the first two questions must be in the negative. The common law sharply distinguished personal rights from surviving ones of

ployer, recovered when numerous mannikins made in her form and features were sold to others).

125. *State ex rel. La Follette v. Hinkle*, 131 Wash. 86, 229 Pac. 317 (1924).

126. *Garden v. Parfumerie Rigaud*, 151 Misc. 692, 271 N. Y. Supp. 187 (Sup. Ct. 1933).

127. A related problem is whether invasion of one living person's right gives a cause of action to another based on some relationship. Cf. *Clayman v. Bernstein*, 38 Pa. D & C 543 (1940) (joint action by husband and wife for medical photograph of latter's face upheld); *Von Thodorovich v. Franz Josef Beneficial Ass'n*, 154 Fed. 911 (C.C.E.D. Pa. 1907) (Austro-Hungarian consul granted injunction restraining use of Emperor's name) with *Murray v. Gast Lithographic & Engraving Co.*, 8 Misc. 36, 28 N. Y. Supp. 271 (Com. Pl. 1894) (father has no right to maintain action for publication of infant daughter's portrait).

property.¹²⁸ Tort actions, even including ones classed as involving rights of property, did not survive. Since inanimate things cannot have rights, "property" rights must also be personal, and the ancient distinction is illusory. Nevertheless, survival of a privacy action must depend on legislation. A few states have statutes providing for the survival of all actions.¹²⁹ Under these, no question of survival or abatement of privacy as distinguished from other actions is presented. Other states have survival statutes including only certain interests in property or persons, or both. Many of these were enacted before the right of privacy came into being. Some of them expressly denied survival in libel and slander, actions closely akin to privacy.¹³⁰ Because of variations between the statutes of different states, no generalization can be made.¹³¹ Recent judicial¹³² and legislative¹³³ action indicate that early cases¹³⁴ holding privacy actions to abate have been repudiated.

(3) The question of whether a cause of action exists in a deceased person's memory was at first answered in the negative: "It is a right of the living and not of the dead."¹³⁵ Later cases have abandoned this position. Thus where a hospital permitted newspaper photography of a deformed infant's nude corpse, the parents were allowed to recover.¹³⁶ And where a photographer was employed to make a dozen pictures of the corpses of Siamese twins, an action by the parents was sustained when additional copies were made and copyrighted.¹³⁷ In New York¹³⁸ the statute confines the

128. 3 Holdsworth, *History of English Law* (1923) 576-585.

129. E.g., N. Y. Decedent Estate Law §119: "No cause of action for injury to person or property shall be lost because of the death of the person in whose favor the cause of action existed."

130. Ala. Code, § 5712 (1940); Ark. Dig. Stat., § 1274 (1937); Colo. Stat. Ann., c. 176, § 247 (1937); Del. Rev. Code, § 4646-37 (1936); Ill. Rev. Stat., c. 3, § 494 (1945); Ky. Rev. Stat., §411.140 (1943); Md. Code, art. 75, § 29 (1939); Neb. Rev. Stat., art. 14, § 25-1402 (1943); N. C. Gen. Stat., § 28-172 (1943); Ohio Gen. Code, § 11397 (1938); Okla. Stat., tit. 12, § 1052 (1937); Pa. Stat., tit. 20, § 772 (1930); D. C. Code, § 12-101 (1941).

131. See Evans, "A Comparative Study of the Statutory Survival of Tort Claims for and against Executors and Administrators," 29 Mich. L. Rev. 696 (1931).

132. *Reed v. Real Detective Pub. Co., Inc.*, 162 P. 2d 133 (Ariz. 1945) (motion to substitute administratrix on death of defendant during action for unauthorized publication of photograph upheld). Note, 41 Ill. L. Rev. 114 (1946).

133. See note 129, *supra*.

134. *Metter v. Los Angeles Examiner*, 35 Cal. App. 2d 304, 95 P. 2d 491 (1939); *Wyatt v. Hall's Portrait Studio*, 71 Misc. 199, 128 N. Y. Supp. 247 (Sup. Ct. 1911).

135. *Schuyler v. Curtis*, 147 N. Y. 434, 447, 42 N. E. 22 (1896).

136. *Bazemore v. Savannah Hospital*, 171 Ga. 257, 155 S. E. 194 (1930).

137. *Douglas v. Stokes*, 149 Ky. 506, 149 S. W. 849 (1912).

138. N. Y. Civil Rights Law, § 51.

right to a "living person," but those in Virginia¹³⁹ and Utah¹⁴⁰ confer it on survivors.

It is sufficient to note that the right is not extended beyond the grave when recovery is had by surviving relatives and representatives. It is their feelings of humiliation, not those of the deceased, which are given protection. By affirmatively answering these three questions, a uniform statute on privacy would dispel existing doubt and provide a desirable solution.

F. DISGUISED RECOGNITION OF THE RIGHT

A uniform act on the right of privacy, if it accomplished nothing else, would obviate the undesirable consequences of permitting recovery in such cases in the guise of some other right. The earliest English cases involving what many courts today would label the right of privacy were disposed of then on the basis of compromise between immediate justice and deference to demands of *stare decisis*. These decisions were first pegged on "property rights." This was motivated by more than a desire to invest privacy with a cloak of juristic respectability. The power of equity to enjoin the infringements of rights has often been held to extend only to the protection of one's property.¹⁴¹ The extremes to which English courts went to find a "property" right demonstrate how much it served as a good reason rather than a real one.¹⁴² A few American courts have employed the rationale of property rights in such cases¹⁴³ and have

139. Va. Code, § 5782 (Michie et al., 1942).

140. Utah Code Ann., § 103-4-8 (1943).

141. *Gee v. Pritchard*, 2 Swanst. 402 (1818) (a dictum often regarded as a holding); *Baker v. Libbie*, 210 Mass. 599, 97 N. E. 109 (1912).

142. See *Routh v. Webster*, 10 Beav. 561, 50 Eng. Rep. 698 (1847) (plaintiff's name incorrectly listed as director of corporation, held violation of a property right because of possibility of suit in capacity of director; *Walter v. Ashton*, (1902) 2 Chan. Div. 282, (defendant falsely advertised bicycles used by London Times, held possible liability of newspaper for misrepresentations a property right).

143. The leading case is *Munden v. Harris*, 153 Mo. App. 652, 134 S. W. 1076 (1911) (plaintiff, a five-year old child, recovered for publication of a likeness in advertisement over caption: "Papa Is Going to Buy Mama an Elgin Watch for a Present; and Someone (I Mustn't Tell Who) Is Going to Buy My Big Sister a Diamond Ring. So Don't You Think You Ought to Buy Me Something? The Payments are So Easy You'll Never Miss the Money."). See also *Schuyler v. Curtis*, 147 N. Y. 433, 42 N. E. 22, 28 (1895) ("I cannot see why the right of privacy is not a form of property, as much as is the right of complete immunity of one's person"—Judge Gray, dissenting); *Corliss v. E. W. Walker Co.*, 64 Fed. 280, 282, 31 L. R. A. 283 (C.C.D. Mass. 1894) ("Independently of the question of contract, I believe the law to be that a private individual has a right to be protected in the representation of his portrait in any form; that this is a property as well as a personal right"); *Clayman v. Bernstein*, 38 Pa. D & C 543 (1940) ("The facial characteristics or peculiar cast of one's features . . . belong to the indi-

shown considerable ingenuity in discovering them.¹⁴⁴

Manifestly, such efforts protect property rights only incidentally. It is not expropriation of which the plaintiff complains when his likeness has been published, but the disturbance to his emotional well-being. Such judicial sublimation has two undesirable effects: (1) By limiting recovery to those invasions which involve monetary loss or gain it excludes relief where the damage is to mental comfort and not to the pocketbook; (2) By identifying privacy with commercial appropriation, it has caused more daring courts to give relief for invasion of privacy in cases involving forms of unfair competition.¹⁴⁵ The danger is that the new tort will swallow a host of other ones in the business field.¹⁴⁶ Moreover, the reluctance of equity to protect non-property rights is beginning to disappear. All rights, both personal and property, are individual; and, strictly speaking, there are no property rights, but only personal ones.¹⁴⁷

American courts have frequently turned to fundamental law either as a basis for relief or as justification for the existence of the right. Courts have leaned on "natural law,"¹⁴⁸ the "pursuit of happiness" of the Declaration of Independence¹⁴⁹ or state constitu-

tional and may not be reproduced without his permission.") ; *Edison v. Edison Polyform & Mfg. Co.*, 73 N. J. Eq., 136, 67 Atl. 392 (1907) (defendant licensed to manufacture remedy for neuralgia compounded by Thomas A. Edison, sold it with Edison's name and photograph on label; held property rights infringed).

144. *Vanderbilt v. Mitchell*, 72 N. J. Eq. 910, 67 Atl. 97 (1907). The court restrained the use of a husband's name on a birth certificate sought by his wife for her adulterine child. A property right was found in the possibility of suit by the child against the plaintiff for necessities.

145. *Eliot v. Jones*, 66 Misc. 95, 120 N. Y. Supp. 989 (Sup. Ct. 1910).

146. In *Waring v. W. D. A. S. Broadcasting Station*, 327 Pa. 433, 194 Atl. 631 (1937), Fred Waring sought to enjoin broadcast of recordings of his arrangements. The majority of the court found a property right in the orchestra's style of rendition as recorded. Maxey, J., concurred on grounds of invasion of privacy. Cf. *Restatement of Restitution*, § 136, "a person who has tortiously used a trade name, trade secret . . . or other similar interest of another, is under a duty of restitution for the value of the benefit thereby received."

147. In *Flake v. Greensboro News Co.*, 212 N. C. 780, 790, 195 S. E. 55, 62 (1938), the court said: "All rights are individual. A person has a right to the possession, control, use and disposition of property. This right is as personal as the right to individual liberty, free speech or any other like right possessed by a citizen. The individual right which relates to property is loosely termed a property right. Some of the cases dealing with the 'right of privacy' treat it as a species of property right." See also *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 193, 50 S. E. 68 (1905); *Mau v. Rio Grande Oil Co.*, 28 F. Supp. 845, 846 (N.D. Cal. 1939).

148. See *Pavesich v. New England Mut. L. Ins. Co.*, 122 Ga. 190, 50 S. E. 68 (1905).

149. See *Peed v. Washington Times Co.*, 55 Wash. L. Rep. 182 (D.C. 1927).

tion,¹⁵⁰ and due process clauses in state and federal constitutions.¹⁵¹ If such rationalizations are necessary, natural law and the Declaration of Independence are, for that purpose, as imposing sources as any, except that courts have never been so naïve as to attempt to give judicial content to the term "happiness." But in trying to find constitutional basis for the right, courts are in error. Such restrictions as the due process clause are limitations only on governmental action. They do not confer personal rights on an individual which can be exercised against another.¹⁵²

Both English and American courts have permitted recovery in privacy cases by striving to find breach of confidence,¹⁵³ implied contract,¹⁵⁴ defamation,¹⁵⁵ and even nuisance¹⁵⁶ and assault.¹⁵⁷ The absurd predicament into which such reasoning may sometimes lead a court appears in *Pollard v. Photographic Co.*¹⁵⁸ In that case, a photographer sold copies of the plaintiff's portrait on Christmas cards. The court found an implied contract that the negative was to be used only to fill the subject's order. Plaintiff's counsel conceded that had the photograph been taken surreptitiously, the defendant could freely exhibit it, since then there would have been no consideration.

G. CONFLICT-OF-LAWS PROBLEMS

One of the most urgent needs for uniform legislation on privacy arises from the difficulties found in that connection in the field of conflict-of-laws. What choice of governing law is to be

150. *Melvin v. Reed*, 112 Cal. App. 285, 297 Pac. 91 (1931).

151. See *Munden v. Harris*, 153 Mo. App. 652, 134 S. W. 1076 (1911); *Pavesich v. New England Mut. L. Ins. Co.*, 122 Ga. 190, 50 S. E. 68 (1905).

152. See *Prudential Ins. Co. v. Cheek*, 259 U. S. 530, 66 L. ed. 1044 (1922).

153. *Abernathy v. Hutchinson*, (1825) 3 L. J. Ch. (Eng.) 209 (publication of oral lectures restrained).

154. *Pollard v. Photographic Co.*, (1888) L. R. 40 Ch. Div. (Eng.) 345 (injunction against reproduction of unauthorized prints on grounds of breach of contract and breach of confidence); *Stedall v. Houghton*, (1901) 18 Times L. R. (Eng.) 126; *McCreery v. Miller's Groceteria Co.*, 99 Colo. 499, 64 P. 2d 803 (1936) (use of photograph for advertising purposes); *Fitzsimmons v. Olinger Mortuary Ass'n*, 91 Colo. 544, 17 P. 2d 535 (1932) (use by undertaker of photograph of corpse of plaintiff's husband); *Moore v. Rugg*, 44 Minn. 28, 46 N. W. 141 (1890) (unauthorized delivery to third person of copy of plaintiff's photograph).

155. *Monson v. Tassaude, Ltd.*, (1894) 1 Q. B. (Eng.) 671 (recovery in libel for exhibition of wax figure of plaintiff); *Tolley v. J. S. Fry & Sons*, (1930) 1 K. B. (Eng.) 467 (recovery in libel for caricature of golfer in advertisement of candy).

156. *Pritchett v. Knox County*, 42 Ind. App. 3, 85 N. E. 32 (1908) (windows of jail with profane inmates overlooking plaintiff's residence).

157. *McGlone v. Hauger*, 56 Ind. App. 243, 104 N. E. 116 (1913).

158. (1888) L. R. 40 Ch. Div. (Eng.) 345.

made for a typical invasion involving most of the 48 states? The problem is also presented, of course, by such multi-state torts as libel, slander, disparagement or trade libel and most of the competitive ones, such as unfair competition. But in the case of privacy, it is made more acute by the silence of most states on the existence of the right. The right can be found in Switzerland, France and Scotland.¹⁵⁹ It has the judicial recognition of California, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Missouri, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, and South Carolina, as well as that of Alaska, the District of Columbia, and federal courts.¹⁶⁰ New York, Virginia and Utah have passed statutes providing for the right in circumscribed form.¹⁶¹ Only in Rhode Island, on the basis of actual holdings, is there no legally recognized right of privacy.¹⁶² The courts of three other states have considered the matter. In two, Michigan¹⁶³ and Wisconsin,¹⁶⁴ there will probably be no judicial recognition. In the third, Washington,¹⁶⁵ recent tendencies have been more favorable. Twenty-seven states have never passed on it. Thus, as distinguished from the usual variations among states as to the scope of a tort, with respect to the existence itself of the right of privacy on the American jurisdictional checkerboard, 27 of the 48 spaces are blank.

Under no choice of law principle can a substantive rule be indicated where none exists. But even among states where some action has been taken with respect to the right, no conflicts rule has been formulated which will adequately designate governing law in an action for its multi-state invasion. Consideration of several proposed solutions indicates why courts and counsel have happily ignored the problem in almost all of the cases:

(1) *Substantive law of forum*. Since the court in which the action is brought can more easily determine its own substantive law than it can ascertain that of another jurisdiction, it might ap-

159. Gutteridge and Walton, "The Comparative Law of the Right of Privacy," 47 L. Q. Rev. 203, 218 (1931).

160. Note, 138 A. L. R. 28, 29 (1942) (cases collected).

161. N. Y. Civil Rights Law, §§ 50, 51; Va. Code, § 5782 (Michie et al., 1942); Utah Code Ann., §§ 103-4-7—103-4-9 (1943).

162. Henry v. Cherry, 30 R. I. 13, 73 Atl. 97 (1909).

163. Cf. De May v. Roberts, 46 Mich. 160, 9 N. W. 146 (1881) with Atkinson v. John E. Doherty & Co., 121 Mich. 372, 80 N. W. 285 (1899); Miller v. Gillespie, 196 Mich. 423, 163 N. W. 22 (1917).

164. See Judevine v. Montanye Fuel & Warehouse Co., 222 Wis. 512, 269 N. W. 295 (1936); Schultz v. Frankfort Mut. Accident & P. G. Ins. Co., 151 Wis. 537, 159 N. W. 386 (1913).

165. See Lewis v. Physicians and Dentists Credit Bureau, 127 Wash. 252, 177 P. 2d 896 (1947); Note, 22 Wash. L. Rev. 229 (1947).

pear convenient for the forum always to provide the governing law in multi-state cases. But the forum is not invariably the jurisdiction most significantly connected with the controversy, and to make the outcome vary with the forum violates this basic tenet of conflicts. Since jurisdiction over defendants responsible for nationwide communications may be had in almost any state, the plaintiff could "shop around" for the most favorable substantive rule and most liberal damages.

(2) *Place of last event.* At least one case¹⁶⁶ has applied the *Restatement*¹⁶⁷ choice-of-law rule that the governing law is to be supplied by the place where the "last event" takes place which is "necessary to make an actor liable." In privacy situations, this is the place where publication occurs. In radio and television, transmission is both simultaneous and multi-jurisdictional, and determination of the place of first impact would require the atomic accuracy of the physicist.

(3) *Point of origination.* The place of the act has often been suggested as the state to provide the governing law.¹⁶⁸ This would give publishing and broadcasting defendants opportunity to select a favorable jurisdiction for operations. What is the point of origin for periodicals which are edited in one state and printed in another, or those printed and shipped from two states?¹⁶⁹

(4) *State of principal circulation.* Some have suggested that governing law should be provided by the state of principal circulation.¹⁷⁰ This rule would amount, in effect, to the adoption of the New York substantive law. This seems undesirable since the New York right, a statutory one, is decidedly limited in scope.

(5) *Domicil of the plaintiff.* The domicil of the plaintiff might offer suitable governing law. Disturbance to a person's peace of mind probably has its most significant contact there. However, the rule breaks down for individuals with multiple domicils. Plaintiffs of national prominence might suffer more from invasions of their privacy elsewhere than at home. For publishers and broadcasters this rule would spell chaos and no predictable standard of conduct would be provided.

166. *Banks v. King Features Syndicate, Inc.*, 30 F. Supp. 352 (S.D. N.Y. 1939).

167. *Restatement, Conflict of Laws*, § 377 (1934).

168. *Hancock, Torts in the Conflict of Laws* 252 (1942); *Cook, Logical and Legal Bases of the Conflict of Laws* 315-18 (1942).

169. *Cf. Hartmann v. Time, Inc.*, 64 F. Supp. 671 (E.D. Pa. 1946) (periodical printed and shipped from two cities).

170. *Cf. Palmer v. Mahin*, 120 Fed. 737, 746 (C.C.A. 8th 1903).

These proposals for a choice of law principle, all pointing to substantive rules of a single state, are inadequate. A conflicts principle designating the rules of the plurality of states in which circulation occurred would only add to confusion.¹⁷¹ Moreover, there can be no assurance of judicial determinations to fill the hiatus in the substantive law itself. Only a uniform statute can provide a satisfactory solution. Congress itself might undertake such an enactment. However, limitations on federal jurisdiction would result in dual rules: a federal statute for multi-state invasions superimposed upon the present welter of judicial dissonance governing intra-state ones. Previous state experience and the Congress' reluctance to enact legislation affecting the press suggest that the solution, if any, must be by uniform state act.

H. INADEQUACY OF EXISTING STATUTES

The need for uniform legislation on the right privacy is also indicated by the inadequacy of existing statutes. Of the three in effect, the New York one¹⁷² is the prototype and the most frequently construed by the courts. Designed to meet criticism of *Roberson v. Rochester Folding Box Co.*,¹⁷³ this statute is drawn no more broadly than to overrule that decision. Section 50 makes the use of a living person's name, portrait or picture for advertising or trade purposes without first having obtained written consent a misdemeanor. With some unimportant exceptions, section 51 gives such person a civil remedy by injunction or damages. The jury is given discretion to award exemplary damages where the conduct is wilful. The effect has been similar to the relief granted by those jurisdictions which recognize the right of privacy only in the disguise of one of property: it narrows protection to commercial exploitations of names, portraits and likenesses. While this is the most common form of invasion of privacy, other flagrant types remediable at common law are not actionable. Since only the use of a name or likeness is within the statute's prohibition, publication of the most intimate details of private life are outside its scope. Publication for political or personal motives, no matter how much mental disquiet is caused, apparently would not be actionable. Numerous invasions such as wiretapping, eavesdropping, shadowing and the like amounting to intrusions without involving publication are outside the statute's protection even though actionable at com-

171. Cf. *O'Reilly v. Curtis Pub. Co.*, 31 F. Supp. 364 (D. Mass. 1940).

172. N. Y. Civil Rights Law, §§ 50, 51.

173. 171 N. Y. 538, 64 N. E. 442 (1902).

mon law. Invasions involving deceased persons, public institutions, corporations and partnerships are not remediable. The coupling of the civil remedies with the criminal provision, although the latter is rarely invoked, has caused courts to characterize the statute as penal and to construe it strictly.¹⁷⁴ Its legislative history has been mentioned to justify the interpretation that the statute embraces only situations analogous to the *Roberson* case and no others.¹⁷⁵

The requirement of written consent has led in some situations to unjust results.¹⁷⁶

The statutes in Virginia¹⁷⁷ and Utah¹⁷⁸ have been rarely invoked and have had only slight influence on the development of the right in other states. Like the New York statute, both limit protection to commercial use of names, portraits and likenesses, require advance written consent, penalize invasions as misdemeanors, and provide for injunction, civil and exemplary damages. Both are more liberal in extending the right to representatives of deceased persons and parents or guardians of minors. The Utah statute, unlike that of New York or Virginia, also protects public institutions and the titles of public officers of the State.¹⁷⁹ The Virginia statute is more limited than the others in that protection is extended only to residents.¹⁸⁰

II

Examination of over half-century of legislative and judicial experience with the right of privacy suggests the contours of a desirable uniform statute. It ought to include intrusions upon private affairs as well as publications. As for the latter, word portrayals should be just as actionable as use of a name, portrait or picture. The right should be extended not only to living persons but to representatives of deceased ones and to parents or guardians for minors. The purpose of the interference should not be restricted to trade or advertising. It should include invasions actuated by personal malice and for political purposes. Indeed it ought to cover

174. See *Merle v. Sociological Research Film Corp.*, 166 App. Div. 376, 152 N. Y. Supp. 829 (1st Dept. 1915); *Colyer v. Richard K. Fox Pub. Co., Inc.*, 162 App. Div. 297, 146 N. Y. Supp. 999 (2d Dept. 1914); *Binns v. Vitagraph Co. of America*, 210 N. Y. 51, 103 N. E. 1108 (1913).

175. *Jackson v. Consumer Pub. Co., Inc.*, 169 Misc. 1022, 10 N. Y. S. 2d 691 (Sup. Ct. 1939), aff'd, 256 App. Div. 965, 10 N. Y. S. 2d 694 (1st Dept. 1939); *Lahiri v. Daily Mirror*, 162 Misc. 776, 295 N. Y. Supp. 382 (Sup. Ct. 1937).

176. See note 126, *supra*.

177. Va. Code, § 5782 (Michie et al., 1942).

178. Utah Code Ann., §§ 103-4-7—103-4-9 (1943).

179. *Id.*, § 103-4-7.

180. See note 177, *supra*.

any interference the object of which does not subserve dissemination of news, furtherance of education, administration of law or other legitimate public interest. It should be immaterial whether the invasion is written or oral. Recovery ought not to vary with the medium of publication. Written consent in advance should not be required to escape liability. Any consent, whether before or after, written or oral, should be sufficient. To avoid strict construction to which a remedial statute of this type ought not to be subjected, no penal liability should attach. Damages for injuries sustained, exemplary damages for wilful invasions and injunction to prevent and restrain infringements, should be sufficient sanction. A possible statute embodying these considerations appears in the *Appendix*. In states having a statutory action at present, the proposed uniform act would enlarge the right and overcome many inadequacies. In other states recognizing the right, it would provide a more predictable standard of what constitutes invasion. In still other states, the undesirable consequences of disguised recognition of the right would be obviated. And for the majority of states, it would forthwith resolve doubt as to the right's existence. For all states, the puzzle of choice of law in multi-state invasions would be solved. The adoption of such a uniform act by a number of states would do much to dispel present confusion.

APPENDIX

Proposed Uniform Act on Right of Privacy

§1.0—*Definition*. Any person, firm or corporation that interferes with any living person, or with a deceased's memory, by intruding, in an unreasonable and serious manner upon the private activities of the living, or by making known in like manner the private affairs of any one, living or deceased, or by exposing such person to the public by substantial use of his name, portrait, picture, likeness or by other means sufficient to identify him, shall be liable for invasion of his privacy, except as hereinafter provided.

§1.1—*Justification*. The interference shall be justified and not actionable if its purpose is the dissemination of news, furtherance of education, administration of law, or other end of legitimate public interest.

§1.2—*Consent*. The interference shall not be actionable if the person interfered with gives his consent, whether written or oral.

In the case of minors, their parents or guardians must consent, and in that of deceased persons, their heirs or personal representatives.

§1.3—*Photographers*. This statute shall not apply to commercial photographers who exhibit specimens of their work about their establishment, unless they continue to do so after protest, whether written or oral, of the person portrayed.

§1.4—*Manufacturers or dealers*. This statute shall not apply to any person, firm or corporation which uses the name, portrait or likeness of any manufacturer or dealer in connection with goods which he himself has previously disposed of under such name or mark of identification.

§1.5—*Artists or composers*. This statute shall not apply to any person, firm or corporation which uses the name, portrait or likeness of an author, composer or artist, in connection with productions which he himself has previously disposed of under such name or mark of identification.

§2.0—*Remedy. Injunction*. Any person under §1 whose privacy has or may be invaded is entitled to maintain an equitable action for an injunction in order to restrain or prevent it. If the person is a minor, the action may be brought by his parent or guardian, or if he is deceased, by his heirs or personal representatives.

§2.1—*Damages*. Any person whose privacy has been invaded and for whom a remedy is provided under §2.0 may also sue and recover damages for injuries which he has sustained. If the invasion is wilful, he may be awarded damages of an exemplary nature.

§2.2—*Abatement*. An action under §2 shall not abate because of the death of plaintiff or defendant.